In The

Supreme Court of the United States

October Term, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH F. CANTERBURY, JR.,
4050 First National Bank Building,
Dallas, Texas 75202,
Counsel for Petitioner.

SMITH SMITH DUNLAP & CANTERBURY
Of Counsel
4050 First National Bank Building
Dallas, Texas 75202

BOWEN L. FLORSHEIM
On the Petition

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Court Decisions

Pending Cases

Statutes

Periodicals and Other

In The

Supreme Court of the United States

October Term, 1973

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Connell Construction Company, Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on August 22, 1973.

OPINIONS BELOW

The findings of fact and conclusions of law in the District Court are reported at 78 LRRM 3012 (N.D. Tex. 1971) and are reproduced as Appendix A (pp. A-1 - A-7, infra). The opinion of the Court of Appeals is reported 483 F. 2d. 1154 (5th Cir. 1973), and is reproduced as Appendix B (pp. B-1 - B-65, infra.)

JURISDICTION

The judgment and opinion of the Court of Appeals, with Judge Clark dissenting, was entered on August 22, 1973. Petitioner made timely Motion for rehearing en banc, which Motion was denied by Order of the Court of Appeals on November 19, 1973 (Appendix B, p. B-66, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether an agreement in restraint of trade between a union and a general contractor in the construction industry which requires the general contractor to refuse to do business with, and to boycott any business entity unless such entity is a party to an exclusive form of collective bargaining agreement with that particular union, violates the Sherman Anti-Trust Act and/or the anti-trust laws of the State of Texas in the absence of a collective bargaining relationship between such trade union and such general contractor.

II.

Whether a federal court should adjudicate questions of the National Labor Relations Act when such questions arise in the context of, and are vital to, determinations of violations of the federal and/or state anti-trust laws.

III.

Whether an agreement in restraint of trade and combination between a general contractor and a union is protected by the National Labor Relations Act if the agreement, its procurement and its maintenance, are not addressed to the labor relations of the general contractor *vis-a-vis* his own employees and the agreement is not for any legitimate union interest.

FEDERAL AND STATE STATUTES INVOLVED

The Federal Statutes involved are as follows:

1. Sherman Anti-Trust Act (15 U.S.C. § 1) (Appendix C, (p. C-1).
2. Clayton Act, Sections 6 and 10 (15 U.S.C. § 17, and 29 U.S.C. § 52) (Appendix C, p. C-1 - C-2).
3. National Labor Relations Act (29 U.S.C. § 151, et seq. Sections 7, 8(b)(4)B, 8(e) (Appendix C, pp. C-2 - C-4).

The State Statutes involved are as follows:

1. Vernon's Texas Codes Annotated, Business and Commerce Codes, Sections 15.02, 15.03 and 15.04 (Appendix C, pp. C-4 - C-6).

STATEMENT OF THE CASE

Petitioner, hereinafter referred to as "CONNELL", is a general contractor engaged in the construction business in Dallas, Texas. CONNELL has collective bargaining agreements with various construction trade unions which represent its employees. CONNELL does not, however, employ anyone engaged in plumbing or similar work. Union has at all times been a "stranger union" to CONNELL and its employees. CONNELL obtains its work on a competitive bid basis and, in turn, selects subcontractors for plumbing and mechanical equipment, materials and labor on a competitive bid basis. Prior to the events which resulted in this case, CONNELL had done business for many years with both union and non-union plumbing and mechanical subcontractors.

Plumbers and Steamfitters Local Union No. 100, Respondent herein, and hereinafter called "UNION", represents its members with various mechanical and plumbing firms in the North Texas area. UNION negotiated a Master Area-Wide collective bargaining agreement with a multi-

employer association consisting of the largest unionized plumbing and mechanical construction firms in the North Texas area.

In late 1970, UNION demand that CONNELL enter into an agreement with UNION whereby CONNELL would agree not to do any business with plumbing and mechanical construction firms unless such firms were parties "to an executed current collective bargaining agreement" with UNION.[1] When CONNELL failed to sign the agreement, UNION, in January 1971, commenced picketing a construction project on which CONNELL was general contractor.

At the time such picketing was commenced, approximately 150 employees of CONNELL and various subcontractors working on that project left the project, bringing about a halt to all construction work. The plumbing subcontractor on CONNELL's project being picketed in fact had a collective bargaining agreement with UNION. The admitted purpose of the picketing by UNION was to force CONNELL to enter into the agreement restricting CONNELL's right to select or to do business with plumbing and mechanical subcontractors unless they had a collective bargaining agreement with UNION. UNION did not seek to organize or to represent any of CONNELL's employees.[2] This picketing continued until a Temprorary Restraining Order was issued against UNION by the 134th District Court of Dallas County, Texas on January 21, 1971. The Restraining Order was issued after CONNELL had filed suit in that Court alleging that the subject agreement and the picketing for same were violative of the anti-trust laws of the State of Texas.

UNION successfully removed the case to the United States District Court for the Northern District of Texas

[1] The agreement is set forth on Page 2 of the Fifth Circuit's opinion, Appendix B (p. B-2, infra), and as Appendix D (p. D-1, infra).

[2] UNION'S forwarding letter with the proposed agreement is set forth in Appendix D, p. D-2. CONNEL'S reply to UNION appears at Appendix D-4.

and, after that Court refused to remand the case to the State Court, CONNELL entered, under protest, into the agreement with UNION not to do any business with mechanical or plumbing firms which did not have a collective bargaining agreement with UNION.

CONNELL then amended its pleadings in the United States District Court seeking a Declaratory Judgment, pursuant to 29 U.S.C. § 2201, that the subject agreement with UNION violated the Sherman Anti-Trust Act as well as the anti-trust laws of the State of Texas. UNION filed a counterclaim seeking a Declaratory Judgment that the agreement was legal and was protected by Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158-e), hereinafter referred to as "NLRA".

During the trial of the case, UNION's business agent testified that the only collective bargaining agreement UNION could enter into with plumbing firms was the identical agreement UNION had with the multi-employer group of mechanical contractors. This fact was further established by provisions of the Master Area Agreement barring UNION from entering into contracts providing for lesser wages and working conditions.

After the trial of the case before the Federal District Court, Judge Sara T. Hughes issued Findings of Fact and Conclusions of Law on November 9, 1971, Judgment being entered in the case on November 18, 1971, (Appendix A, p. A-7). The District Judge held that the agreement in question was protected by the construction industry proviso to Section 8(e) of the NLRA, thereby immunizing it from the federal and/or state anti-trust laws.

Appeal of the District Court's Judgment was timely perfected to the United States Court of Appeals for the Fifth Circuit, and the Court of Appeals, Judge Clark dissenting, rendered its sixty-five (65) page decision and opinion affirming the judgment of the District Court on August 22, 1973. CONNELL subsequently and timely filed a Petition for Rehearing and for Rehearing *en banc*, and, on November 19,

1973, the Court of Appeals issued its Order denying the Motion. Judge Clark dissented as to the denial of CONNELL's Petition for Rehearing, (Appendix B, p. B-66).

The majority opinion of the Court of Appeals held that the activities of UNION and the questioned agreement were immune from the federal anti-trust laws and that the anti-trust laws of the State of Texas were preempted by federal labor law. The majority of the Court of Appeals failed to find an illegal conspiracy on the grounds that CONNELL was the sole "non-labor" party to the questioned agreement (Appendix B, p. B-23, infra). However, the majority of the Court refused to decide whether the questioned agreement was violative of, or protected by, the NLRA, even though the District Court had previously found the agreement to be protected solely by Section 8(e) of that Act. The Court of Appeals acknowledged that the General Counsel of the National Labor Relations Board (NLRB) had refused to issue a complaint in a case involving picketing by UNION to obtain a similar agreement from another generator contractor (Appendix B, pp. B-6 and B-45), in Dallas, Texas and strongly urged that the NLRB decide the labor issues of the questioned agreement at the "next available opportunity";[3] however, the Court majority refused to pass on the labor issues even though they are inextricably joined with the anti-trust questions of this case.

Judge Clark, dissenting, found that the doctrine of primary jurisdiction under the national labor laws did not constitute a bar to judicial relief in the instant case or a bar to

[3] The majority of the 5th Circuit Court stated:

"We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion." (Appendix B, p. B-40, infra).

The General Counsel of the NLRB has continued to refuse to issue Complaints in two cases pending with him involving identical agreements prior to the 5th Circuit's opinion and in one filed with the NLRB since the Court's decision, as discussed in Reasons for Granting the Writ, infra.

a determination of labor law issues by the Court of Appeals. Judge Clark also found that UNION was not immune from the Sherman Anti-Trust Act as to its actions and purposes in issue before the Court and that UNION's actions were secondary in nature, violative of both the NLRA and the Sherman Anti-Trust Act, and were not protected by the construction industry proviso to Section 8(e) of the NLRA.

FEDERAL JURISDICTION

Jurisdiction in the United States District Court for the Northern District of Texas was initially predicated on the Federal Removal Statute, 28 U.S.C. § 1441, and pursuant to Section 301(b) of the NLRA, 29 U.S.C. § 185(b). Jurisdiction is further conferred by CONNELL's allegations that the agreement in question violates the Sherman Anti-Trust Act, 15 U.S.C. § 1, et seq., and both parties petitioning the Court for relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

REASONS FOR GRANTING THE WRIT

This case presents vital questions of the proper balance between federal anti-trust and labor policies in the nation's largest industry. It is estimated by the Department of Commerce that ONE HUNDRED FORTY-THREE BILLION ($143,000,000,000) DOLLARS will be spent on new construction in the United States in 1974, of which FORTY-THREE BILLION ($43,000,000,000) DOLLARS will be spent on public utilities and public construction, which is paid for by the American public in taxes and utility payments.[4] Therefore, agreements which artificially increase construction costs and restrict competition, as the one herein does, deserve the attention of this Court.

If these restrictive agreements between employers and unions are allowed to continue, they can effectively destroy

[4] *Construction Review*, Vol. 19, No. 9, U.S. Department of Commerce, Sept. 9, 1973, at p. 5. (These figures do not include construction maintenance and repair).

the rights of millions of employees,[5] drive many companies from the construction market and effectively emasculate the Sherman Anti-Trust Act and NLRA for the construction industry. The central question of this case is whether general contractors, such as CONNELL, owners, suppliers, manufacturers and others who perform on-site construction work, can continue to contract for the purchase and installation of construction materials and equipment on a competitive basis or whether they must restrict competition by doing business solely with a favored class of companies which have the "seal of approval" of a particular union. Also involved, as is shown below, is the destruction of all employee rights guaranteed by Section 7 of the NLRA.

In discussing the error of the Court of Appeals, it is important for the Justices of this Court to understand that the UNION sought no representation or work preservation objectives from CONNELL. UNION does not represent nor seek to represent a single employee of CONNELL, but only seeks, and thus far has gained, the right to dictate with whom CONNELL may do business. As this Court ably stated the distinction in *National Woodwork Manufacturers' Association v. NLRB*, 386 U.S. 612 (1967):

> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer (CONNELL herein) *vis-a-vis* his own employees." (386 U.S. at 645).

A. THE DECISION OF THE COURT OF APPEALS LEAVES RESULTS WHICH ARE IN CONFLICT WITH PRIOR DECISIONS OF THE COURT.

Prior to forcing CONNELL to agree to refuse to do business with any plumbing and mechanical firms unless they had a collective bargaining agreement with UNION, the

[5] The Amicus Brief filed with the 5th Circuit by the AFL-CIO, Building and Construction Trades Dept. stated that they alone represent three million construction employees. The rights of many of those employees and the millions of non-union construction employees, as guaranteed by Sec. 7 of the NLRA, can be obliterated by the questioned agreement.

local multi-employer group of mechanical contractors and UNION entered into a collective bargaining agreement whereby UNION agreed to impose no lesser wages and working conditions of the Master Agreement on all other mechanical firms.[6] This type of collective bargaining has been condemned by this Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and in *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971).

In *Pennington*, this Court stated:

> "(W)e think a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. *This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry.*" Id.-665-666 (emphasis added)
>
> "(T)here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The unions' obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as

[6] Article XIX of the Master Collective Bargaining Agreement provides as follows: "The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with any other employer *which provides for any wages less than stipulated in this Agreement* as the minimum wages *or for work under any more favorable term or conditions* to the employer than are expressed or implied in this Agreement *for less than the rate of wages indicated in this Agreement.*" (emphasis added). At the time of trial herein, UNION had negotiated another Master Agreement containing identical language in Article XVII.

> the individual circumstances might warrant, without being straight-jacketed by some prior agreement with the favored employers." Id. at 666.

UNION then went completely outside of any collective bargaining framework and forced CONNELL to agree to refuse to do business with any mechanical or plumbing firms other than the favored employers who were parties to the Master Area Agreement or those that would adopt it, if the UNION would allow them to do so. UNION's business agent testified at the trial of this case that UNION would not and could not sign any agreement other than the Master one with any company. Thus the questioned agreement is in direct conflict with this Court's decisions in *Pennington* and *Ramsey*, supra.

The questioned agreement is violative of the Sherman Act on its face. An analysis of the questioned agreement quickly reveals that it is a contract in restraint of trade, and a union and employer have conspired by entering into the agreement to restrain trade in the construction industry. It was stipulated at the trial of this case that CONNELL was engaged in interstate commerce, or in a business affecting interstate commerce. The agreement is in direct conflict with Section 1 of the Sherman Act unless the fact that one of the parties is a union exempts the agreement and parties to it from the Sherman Act. Although the Fifth Circuit's majority opinion contains an able review of the history of labor unions' anti-trust immunity, the prior decisions of this Court were not applied. The majority opinion failed to find an anti-trust violation because of the supposed absence of a conspiracy between a union and employer. That majority completely ignored the central point that a conspiracy exists between CONNELL and UNION, and that CONNELL was a further link in UNION's attempts to restrict all mechanical and plumbing work to the favored employers.

This Court has previously held that a union forfeits any anti-trust immunities granted by Sections 6 and 20 of the Clayton Act (15 U.S.C. §17; 29 U.S.C. §52) and Sections 1 and 4 of the Norris-LaGuardia Act (29 U.S.C. §§101 and

104) if that union conspires with an employer to lessen or restrict competition. In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), this Court held violative of the Sherman Act a combination among a union and electrical contractors and manufacturers to lessen and restrict competition in electrical products in New York City. The simple product boycott in *Allen Bradley* pales in comparison to the boycott accomplished by the agreement herein. The agreement between CONNELL and UNION results in an effective boycott of all business enterprises which cannot, or do not, for any reason, adopt UNION's established Master Agreement. Also, the boycott is not limited to any particular construction project — it extends to all future work. The result, then, is that all employers who perform some work over which the UNION claims jurisdiction must become parties, assuming UNION's willingness, to the Master Area Agreement (some fifty-six pages in length) before they can do business with employers such as CONNELL. Since the single subcontract in the construction industry has historically covered both products and labor, they are foreclosed from the marketplace. The boycott here, because of the way contracts are let in the construction industry, essentially extends to all the products that would be covered under any contract for mechanical work that CONNELL signs with any other employer.

Even though UNION's conspiring with CONNELL in itself constitutes a forfeiture of its anti-trust immunity, this Court has held in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), that unions acting alone can violate the Sherman Act if their actions result in a restraint of trade and are not for legitimate labor purposes. In *Jewel Tea*, a restriction on market hours contained in a collective bargaining agreement was held exempt from the Sherman Act, but not because of the lack of conspiracy with nonlabor. Although this Court split in the different *Jewel Tea* opinions, the common teaching of these opinions is that unilateral union action is a violation of the Sherman Act if such action results in a restraint of trade and is not in furtherance of legitimate union objectives. The Court of Appeals erro-

neously found UNION's interest herein legitimate. (Appendix B, p. B-37, infra).

For proper application of the legitimate union interest test, the National Labor Relations Act must be examined and balanced with the Sherman Act. In *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), this Court held that not all unilateral union activities were exempt from the Sherman Act. That case involved a primary strike, but this Court failed to find a Sherman Act violation since the restraint of trade resulted from primary activity. UNION's actions against CONNELL were entirely secondary due to the lack of even the possibility of a collective bargaining reationship. In the case of *Columbia River Packers' Association, Inc. v. Hinton*, 315 U.S. 143 (1942), this Court held that attempts to interfere with the business relations of buyers and sellers of fish would not come within the anti-trust immunities afforded unions. Likewise, UNION's attempts to regulate and control business relations between CONNELL and its subcontractors do not come within the anti-trust immunity. UNION does not seek to represent a single employee of CONNELL, but only to regulate with whom CONNELL does business, wholly outside of any collective bargaining relationship. As this Court stated in *Columbia River Packers*, supra:

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer- employee relationship has no bearing." 315 U.S. at 146-147.

Judge Clark correctly held in his dissenting opinion that UNION's actions violated the secondary boycott bans of the NLRA, 29 U.S.C. §158(b)(4)B. It is this Act which establishes the parameters of legitimate union activity; therefore, agreements and actions which violate this Act and also result in a restraint of trade cannot and should not be considered legitimate union activity.

Congress, in enacting the Taft-Hartly Act, sought to outlaw the secondary boycott.[7] In *NLRB v. Denver Building*

Trades Council, 341 U.S. 675 (1951), this Court recognized the objective of Congress in enacting Section 8(b) (4) (B), formerly Section 8(b) (4) (A), of the NLRA, as amended, stating as follows:

> "In the views of the Board as applied in this case we find conformity with the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." Id at 692.

This case generated annual attempts of construction unions to obtain a "common situs" picketing bill from Congress in order to overrule this Court's *Denver Building Trades* decision. Congress has consistently rejected all such attempts.[8] However, if the type of agreement herein is allowed to continue, unions can escape the decisions of this Court and the intent of Congress simply by picketing a general contractor with whom they have no dispute for a similar agreement and their actions magically become primary. The result will be a stranglehold on the entire construction industry.[9]

[7] Section 8(b)(4)(A) of the Taft-Hartley Act, now Section 8(b)(4)(B) of the National Labor Relations Act, as amended by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 158 (b)(4)(B).

[8] Examples are H. R. 9070, H. R. 9089, H. R. 9373, and S. 2643 (86th Congress, 1960); H. R. 10027 (89th Congress, 1965); H. R. 100 (90th and 91st Congress, 1967, 1969); and H. R. 4726 (93rd Congress, 1973).

[9] The questioned agreement is prevalent beyond the one between CONNELL and UNION herein. At the trial of this case, UNION produced evidence that the Los Angeles, California Building and Construction Trades Council has 9,722 similar agreements. The District Court below found in Finding of Fact No. 13, (Appendix A, p. A-4), that UNION had obtained similar agreements from other general contractors in the Dallas area. Attempts of trade unions in Philadelphia to obtain a similar agreement from Altemose Construction Company resulted in approximately $300,000.00 property damage, which actions are the subject of a pending lawsuit, *Altemose v. Building and Construction Trades*, No. 73-773, in the United States District Court for the Eastern District of Pennsylvania. Construction trade unions have also picketed to obtain similar agreements in Florida and Ohio.

Also, the rights granted to employees under Section 7 of the NLRA become illusory as to employees of firms which must do business with CONNELL and other general contractors who sign a similar agreement with a union. This Court recently said in *NLRB v. Savair Manufacturing Company*, ... U.S. ....., 94 S. Ct. 495 (1973), "any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By §7 of the Act, employees have the right not only to 'form, join or assist' unions, but also the right 'to refrain from any or all of such activities.'" Id. at 499.

The type of agreement herein completely negates the rights as to an NLRB conducted election or any other form of self determination by employees of subcontractors who depend on business dealing with general contractors such as CONNELL. Regardless of the desires or rights of his employees, a subcontractor-employer must adopt the Master Agreement with UNION whether his employees like it or not if he is to stay in business. It will make no difference if those employees have previously rejected a union; selected another union and negotiated a contract, or if they simply wish to exercise the right guaranteed by Section 7 of the NLRA to "refrain from any and all such activities." If employees who had the Master Area Agreement forced on them by an employer were dissatisfied, any vote to decertify UNION would be a vote to starve for both employee and employer. Finally, if the union refuses, for any reason, to permit their employer to sign a collective bargaining agreement, he cannot sell his products and they cannot work. Regardless of whether, or to what degree, the union might be guilty of racial, sexual or other discriminatory employment practices, they must continue to be bound to it if they wish to work. Can it be seriously contended that these results are within the employee protections guaranteed by the NLRA?

The overlap and relationship of the anti-trust questions of this case with the NLRA is most ably stated by Judge Clark in his dissent, as follows:

> "When a union seeks to organize those who work for an employer or group of employers there can be no

doubt that Congress has granted it freedom from antitrust proscription to act in concert against such employers in order to bring such employees as may be affected into a unified group of sufficient size to allow the union to deal on a par with management. Congress' balance of the competing interests, as I divine legislative intent, is calculated to produce union peer status, but not union dominance. Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity." (Appendix B, p. 57, infra).

UNION has, throughout this case, taken the position that the construction industry proviso to Section 8(e) of the NLRA[10] protects this agreement from anti-trust sanctions, and the Federal District Court below so held. The majority of the Court of Appeals refused to decide this issue.

Unless protected by Section 8(e), the agreement is violative of Section 8(b)(4) of the NLRA. If UNION's actions in obtaining the agreement are illegal under 8(b)(4), such actions are certainly not legitimate union actions; therefore, they are violative of the Sherman Act in view of the resulting restraint of trade.

Early in the development of the law regarding labor immunity from anti-trust laws, this Court held that secondary boycotts were illegal restraints of trade and that Section 20 of the Clayton Act did not protect them in *Duplex Printing Press Co. v. Deering*, 254 U.S. 433 (1921), and *Bedford Cut Stone v. Journeymen Stonecutters Association*, 274 U.S. 37 (1927). These cases involved unilateral union actions.

[10] Section 8(e) of the NLRA is set forth in Appendix C, pp. C-3 - C-4.

This Court made an exhaustive study of the construction industry proviso in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), and barely, by a 5-4 decision, held that a *primary* subcontracting clause *in a collective bargaining agreement* was protected by the proviso to Section 8(e). In upholding a primary subcontractor clause on the theory that it involved work preservation attempts of carpenters against their own employer, the Court clearly indicated that a secondary subcontractor clause, as presented herein, would not be saved by the 8(e) construction proviso.

In *National Woodwork Mfrs.*, supra, the general contractor, Frouge Corporation, as opposed to CONNELL in the case before this Court, was a *party to the collective bargaining agreement* containing a work preservation clause and Frouge Corporation *hired employees covered by the collective bargaining agreement*. CONNELL is neutral concerning the labor relations of its independent plumbing and mechanical subcontractors, and UNION herein has picketed CONNELL simply to satisfy its objectives of eliminating all companies with which it does not have a collective bargaining agreement. This Court's opinion in *National Woodwork* clearly reveals that the facts presented herein would not be protected by the construction industry proviso to Section 8(e):

> "The determination whether the 'will not handle' sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b) (4) (B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the union's objective was preservation of work for Frouge's employees or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement of boycott would, within the intent of Congress, become secondary." 386 U.S. 643.

This Court further concluded:

> "In effect Congress, in enacting 8(b) (4) (A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*" Id at 632.

Thus, as under *Duplex*, unions, acting alone, conducting the secondary boycotts prohibited under the labor law, are not exempt from the Sherman Act if the union's objective is to restrain trade and the product market as has been shown herein.

Not only is the opinion of the majority of the Court below in direct conflict with the above mentioned decisions of this Court, it is also in conflct with the decisions of this Court in the area of preemption of state law as set forth below.

B. THIS COURT SHOULD DETERMINE THE EXTENT TO WHICH STATE ANTI-TRUST LAWS ARE PREEMPTED BV FEDERAL LABOR LAW.

By its decision, the majority of the Court of Appeals has given labor unions an *absolute and unlimited exemption* from all state anti-trust laws. This result was reached because the Court of Appeals ruled, in effect, that *any* activity which can be a labor matter is protected from state anti-trust action by the doctrine of preemption.

Despite the refusal of the majority of the Court of Appeals to even consider any of the labor law issues inherent in this case, that majority, nevertheless, held that the anti-trust laws of Texas were preempted, not by federal anti-trust laws, but *only by federal labor laws.* (Appendix B, p. B-47). Such a result is in direct conflict with this Court's decisions in *Local 24, Int'l Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1957) and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), where this Court held that Federal labor laws act to preempt state law only when the Federal laws apply to a case and are in real conflict with the state law in question. CONNELL submits that the labor law issues must be decided before there can be even consideration, much less application, of the doctrine of preemption.

In *Oliver*, supra, this Court went to great lengths to express the fact that the essence of federal labor policy is the creation and protection of collective bargaining rights of

employers and employees. Since in the present case there is no collective bargaining relationship between UNION and CONNELL, state anti-trust law clearly cannot be in conflict with federal labor laws in this context.

Throughout this case, CONNELL has asserted that the absence of any employer-employee relationship and any collective bargaining relationship is a central issue in the determination of questions of anti-trust immunity. The significance of this issue was established by this Court very clearly in *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n Dis't 2*, 382 U.S. 181 (1965). That case involved the question of whether federal labor law applied to attempts by picketing to force recognition of a union to bargain only for supervisors and whether or not state law was thereby preempted. This Court held that, since supervisors were not employees under the federal labor laws and no other persons defined as employees were involved, the matter was outside the regime of the NLRA, and the preemption doctrine would not apply. The Court also held that the activities of the picketing union, the employer and the supervisors did not fall into any other clearly protected area of federal labor law which would preempt state law.

In *Giboney*, supra, this Court specifically rejected the theory that labor unions and labor related activities enjoy an inherent exemption from state anti-trust regulations. The questioned agreement clearly violates Sections 15.02, 15.03, and 15.04 of the Texas Business and Commerce Code. (Appendix C, pp. C-4 - C-6). It is inconceivable that the Court of Appeals could properly hold state law preempted without properly, first, considering whether UNION's actions and the agreement in issue were sanctioned and protected by Congress and, second, whether any real conflict with state laws existed under the facts in question.

C. THIS CASE PRESENTS VITAL QUESTIONS OF FEDERAL LAW THAT MUST BE DECIDED AND SETTLED BY THIS COURT.

In both the District Court and the Court of Appeals, UNION and CONNELL *both* took the position that many of the basic anti-trust issues involved in this case hinge on the applicability of the construction industry proviso to Section 8(e) of the NLRA.

Union attempts to obtain work preservation objectives for their members *vis-a-vis* their own employers are not at issue herein. The question of obtaining restrictive clauses outside of the employer-employee relationship is presented, and this question should be answered by this Court. The majority opinion of the Court of Appeals correctly concluded that if the questioned Agreement is not protected by the 8(e) proviso, UNION's activities are a classic example of a violation of the secondary boycott bans of the NLRA. (Appendix B, p. B-44, infra). However, the Court of Appeals refused to answer the question, concluding a lack of jurisdiction. The Sherman Act and the NLRA were not balanced since half of the "balancing act" was disregarded. This refusal of the Fifth Circuit to decide the application of Section 8(e) is erroneous not only because the proper test of legitimate union interest requires the answer in order to decide the anti-trust issues, but, further, because the Court of Appeals was aware of the fact that the General Counsel of the National Labor Relations Board has refused to allow the question to be answered by the NLRB. It was noted that the General Counsel of the NLRB had refused to issue a complaint of illegal 8(b)(4) activities involving UNION and another contractor, KAS Construction Company, arising out of the same Agreement as the one in question. (Appendix B. pp. B-6 and B-45). The refusal of the General Counsel of the NLRB to issue a complaint prevents the NLRB from deciding the proper interpretation of the construction industry proviso to Section 8(e) under the facts of this case, and this refusal is unreviewable. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

Petitioner is aware of two cases arising out of almost identical facts involving the same Agreement that have been pending with General Counsel of the NLRB for sixteen months. These cases are *Ponsford Bros.*, NLRB Case Nos. 28-CC-417, 28-CC-431 and 28-CE-12, and *Hagler Construction Company*, NLRB Case No. 10-CC-447. Since the decision of the Court of Appeals herein, other cases, *Howard U. Freeman, Inc.*, 16-CC-472 - 16-CC-477, have been filed and are also pending with the NLRB's General Counsel; however, no complaints have been issued although the Fifth Circuit urged that the issue be considered by the NLRB at the next available opportunity (Appendix B, p. B-46).

Two other Circuits have recently been frustrated by the problems of primary jurisdiction concerning labor issues arising in anti-trust cases. The Third Circuit, in *Int'l Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F. 2d 384 (3rd Cir. 1973), directed the District Court to certify labor questions involved in an anti-trust case to the NLRB for answer. The NLRB, through its General Counsel, is resisting the answering of those questions. In *Carpenters' District Council v. United Contractors Ass'n of Ohio*, ... F. 2d ...., 84 LLRM 2276 (6th Cir. 1973), pet. for reh. pending, the Sixth Circuit also attempted to remand an anti-trust case to the District Court with directions to certify labor issues to the NLRB. The General Counsel of NLRB is also resisting the NLRB's answering those questions; therefore, at least three Circuits are currently frustrated over the question of primary jurisdiction when labor issues are involved in anti-trust cases. The Fifth Circuit's refusal to decide these questions and referring one in the position of CONNELL to a useless remedy is error and a denial of due process of law.

This Court had no problems in deciding the anti-trust cases of *Allen Bradley*, *Pennington*, *Ramsey* and *Jewel Tea*, supra, even though those anti-trust cases involved labor issues.

It is submitted that, as Judge Clark held in his dissenting opinion, the construction industry proviso to Section 8(e) of the NLRA does not encompass or protect the Agreement in question. This question should be answered by this Court in this case. The resulting judicial economy and economic savings to employers and employees that will result in the lack of economic warfare in the future over similar agreements make the issues of this case worthy of this Court's resolution.

CONCLUSION

For the reasons set out herein and for the reasons given by Judge Clark in his dissenting opinion in the Court below, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Joseph F. Canterbury, Jr.

Counsel for Petitioner

Of Counsel:
SMITH SMITH DUNLAP & CANTERBURY
BOWEN L. FLORSHEIM
On the Petition

CERTIFICATE OF SERVICE

This is to certify that on the 13th day of February, 1974, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Counsel for Respondent by depositing the same in the United States Mail, with First Class postage prepaid, and addressed to Mr. David R. Richards, 600 West 7th Street, Austin, Texas 78701.

Joseph F. Canterbury, Jr.